Supreme Court, U. S.
FILED
AUG 14 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

Term, 1976
No. 76-225

DALE H. REINHART,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

EMMANUEL H. DIMITRIOU,
LIEBERMAN AND DIMITRIOU,
Attorneys for Petitioner

635 Walnut Street
Reading, Pennsylvania 19601
Telephone (215) 376-7217

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	3
Statutes Involved	4
Statement of the Case	6
Reasons for Granting Writ	8
Conclusion	13
Appendix A:	
Opinion of Court of Common Pleas of Schuylkill County	14
Opinions of Supreme Court of Pennsylvania	16
Appendix B:	
Order of Court of Common Pleas of Schuylkill County	28

TABLE OF CASES

Commonwealth vs. DiPasquale, 431 Pa. 536, 246 A.2d 430 (1968)	12
Commonwealth vs. Gant, 213 Pa. Superior Ct. 427, 249 A.2d 845 (1968)	9, 11
Commonwealth vs. Leaming, 442 Pa. 223, 275 A.2d 43 (1971)	9

Downum vs. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed. 2d 100 (1963) 12
Klopfer vs. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967) 8, 9, 12

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1976

No.

DALE H. REINHART,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

DALE H. REINHART, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above-entitled case on March 18, 1976.

OPINIONS BELOW

The opinion of the Court of Common Pleas of Schuylkill County is unreported and is printed in Appendix A hereto, infra page 14.

The opinion of the Supreme Court of Pennsylvania is reported at Pa. , 353 A.2d 848, and is printed in Appendix A hereto, infra page 16.

JURISDICTION

The granting of the nolle prosequi by the Court of Common Pleas of Schuylkill County was entered on January 9, 1973 ,Appendix B, infra page 28) .

A timely appeal was taken to the Supreme Court of Pennsylvania and denied on March 18, 1976 (Appendix A, infra page 16) . The jurisdiction of the Supreme Court is invoked under 28 U.S.C., Section 1257 (3) .

QUESTIONS PRESENTED

1. Whether petitioner has been denied his constitutional right to a speedy public trial under the Sixth Amendment of the United States Constitution and under Article I, §9, of the Pennsylvania Constitution?

2. Whether Rule 314 (a) of the Pennsylvania Rules of Criminal Procedure violates petitioner's rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

3. Whether there was any justification or imperious necessity warranting the granting of the nolle prosequi?

STATUTES INVOLVED

Rule 314 (a) of Pennsylvania Rules of Criminal Procedure:

Rule 314. Nolle Prosequi

(a) Upon application of the attorney for the Commonwealth, the Court may, in open Court, order a nolle prosequi notwithstanding the objection of any person.

Article I, §9, Pennsylvania Constitution:

Section 9. Rights of accused in criminal prosecutions

In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage; he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty, or property, unless by the judgment of his peers or the law of the land.

Sixth Amendment, United States Constitution:

Amendment VI-Jury Trial For Crimes, and Procedural Rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

This case arose as a result of the granting of a motion for nolle prosequi at which time Petitioner Reinhart objected to the ruling of the lower Court.

Appellant was one of four persons charged with the murder of John Lamont Miller on June 13, 1969, at the Miller residence in Schuylkill County, during the commission of a burglary. On June 27, 1972, Reinhart was charged with the crimes of robbery, murder, burglary and conspiracy. Indictments on all charges followed on October 4, 1972.

On January 5, 1973, Reinhart's case was attached for trial in Schuylkill County Court of Common Pleas and Counsel for the Commonwealth and for the Defense advised the Court that they were ready to proceed. Selection of the jury then began. The Court adjourned until January 8, 1973, at 11:00 a.m., when the trial resumed and the jury selection continued. Court adjourned upon completion of the afternoon session and began again January 9, 1973. At 1:45 p.m., the Court adjourned the morning session of Court begun on January 9, 1973.

When the afternoon session of Court began on January 9, 1973, the Commonwealth asked the Court to continue the case due to the fact that a Co-Defendant's, Schneck's, trial ended in acquittal when the Commonwealth's witness, Joseph Bowers, invoked his Fifth Amendment right under the United States Constitution and did not testify.

The trial Court denied the motion for continuance but, over the objection of Reinhart, granted the Commonwealth a motion for nolle prosequi (see Appendix A infra). From this decision and opinion, Reinhart appealed to the Supreme Court of Pennsylvania which upheld the lower Court in an opinion filed March 18, 1976 (Appendix A infra). An order of the Supreme Court of the United States, extending time to file for Writ of Certiorari, dated June 2, 1976, extended the time for filing the writ up to and including August 15, 1976.

On appeal to the Supreme Court of Pennsylvania, Reinhart raised the constitutionality of Rule 314 (a) of the Pennsylvania Rules of Criminal Procedure, the denial of his constitutional right to speedy trial under the Sixth Amendment of the United States Constitution, and Article I, Section 9 of the Pennsylvania Constitution, and the justification or imperious necessity warranting the granting of the nolle prosequi.

REASONS FOR GRANTING WRIT

---

1. Whether Petitioner has been denied his constitutional right to a speedy public trial under the Sixth Amendment of the United States Constitution and under Article 1, Section 9, of the Pennsylvania Constitution?

In support of Reinhart's contention that he has been denied his rights to a speedy public trial, we cite *Klopfer v. North Carolina*, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1 (1967), which deals with a criminal procedure device known as "nolle prosequi". In its considerations and ultimate decision in the *Klopfer* case, the United States Supreme Court took up not only the North Carolina statute involved but similar procedures in various other States. The North Carolina procedure is similar to Rule 314 (a) of Pennsylvania Rules of Criminal Procedure. The North Carolina Supreme Court was reversed in its decision upholding that procedural device, and the United States Supreme Court said:

> "The petitioner is not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go 'withersoever he will'. The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as

> well as the 'anxiety and concern accompanying public accusations', the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the 6th Amendment of the Constitution of the United States." See also *Commonwealth v. Gant*, 213 Pa. Superior Ct. 427, 249 A.2d 845 (1968), and *Commonwealth v. Leaming*, 442 Pa. 223, 275 A.2d 43 (1971).

The Commonwealth has certainly delayed bringing Reinhart to trial from the very beginning of this case. As a result of the allowance of the lower Court in granting the nolle prosequi over Reinhart's objection, the Commonwealth has successfully circumvented Reinhart's right to a speedy trial in that the threat of criminal prosecution may hang over him for years to come. The Commonwealth has denied Reinhart his right to speedy trial. The Commonwealth should have made a motion to dismiss the charges against Reinhart rather than having a nolle prosequi entered against him. The Court should have dismissed the charges with prejudice against the Commonwealth in order to protect Reinhart's constitutional rights.

---

2. Whether Rule 314 (a) of the Pennsylvania Rules of Criminal Procedure violates Reinhart's rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

Rule 314 (a) of the Pennsylvania Rules of Criminal Procedure, 19 P.S. Appendix, provides:

(a) Upon application of the attorney for the Commonwealth, the Court may, in open Court, order a nolle prosequi notwithstanding the objections of any person.

The rule, on its face, effectively closes the door on all defendants and gives to the attorney for the Commonwealth the exclusive and sole right to prosecute or not to prosecute. Defendant's rights are completely ignored. There is no provision for any hearing on a defendant's behalf. This is clearly a denial of due process of law.

In its opinion the lower Court referred to Rule No. 314 (a) as the reason and basis for granting the nolle prosequi. The transcript shows that the Court's reason was based on the Commonwealth's "assertion" that "they were not prepared to go to trial" (Trial Transcript page 22). On the same page, the lower Court then said "we feel that the Commonwealth does not have an unqualified right to reopen and set aside the nol pros". Nowhere in the entire transcript does the Commonwealth "assert" that "they were not prepared to go to trial". The Commonwealth said ". . . at this time we are not able to prove a prima facie case, and we insist that our investigation shows that the witness has been intimidated and has been threatened with his life" (Trial Transcript page 18). And even after the Court specifically asked ". . . whether or not you are prepared to go to trial now?" (Trial Transcript page 18), Commonwealth Counsel responded "In view of our statements to the Court we are not able at this time to prove a prima facie case", and then in response to the Court's, "You state you cannot prove your case", counsel answered "correct". That is the record. Back in November, 1972,

the District Attorney stated the Commonwealth was prepared and ready to go to trial; on January 5, 1973, Commonwealth counsel told the Court it was ready to proceed with the trial, and selection of jurors began. Nowhere in this entire record has the Commonwealth said it was not ready to proceed with the trial. Also, the lower Court's opinion that the Commonwealth does not have an unqualified right to reopen and set aside the nolle prosequi, given as another reason for granting the nolle prosequi, is answered clearly and emphatically in *Commonwealth v. Gant*, 213 Pa. Superior Ct. 427, 249 A.2d 845 (1968), in the following language:

> "The thrust of Klopfer is that no person should be forced to live under the shadow of a criminal indictment without the right to have a quick and final determination of his criminal responsibility. Otherwise, he will suffer anxiety and a feeling of helplessness from the knowledge that at some future date he may be subject to incarceration. . . . Klopfer is not concerned with the final disposition of a criminal prosecution; its only concern is with the presence, for an unreasonable period of time, of an outstanding criminal charge. An accused's emotional distress and anxiety will not be mitigated *by the requirement that there be Court approval of a subsequent prosecution. The concern of the Supreme Court in Klopfer, therefore, is not avoided by this procedural safeguard.*"

Rule 314 (a), supra, does deprive Reinhart of his rights under the due process clause of the Fourteenth Amendment of the United States Constitution, and is indeed unconstitutional because it permits a procedure "which in effect allows state prosecuting officials to put

a person under the cloud of an unliquidated criminal charge for an indeterminate period" and "violates the requirements of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment." (See separate and concurring opinion of Mr. Justice Harlan in *Klopfer v. North Carolina,* 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1.)

---

3. Whether there was any justification or imperious necessity warranting the granting of the nolle prosequi?

In *Downum v. United States*, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed. 2d 100 (1963), the United States Supreme Court held, in a double jeopardy case, that failure of the prosecution to find and have present its key witness did not constitute an "imperious necessity". In Reinhart's case, the Commonwealth's key witness was available and had, in fact, testified for the Commonwealth in a case of similar charges against another defendant who was charged with the same crimes. This key witness, Bowers, was available—he was in the Schuylkill County Prison. In *Commonwealth v. Leaming*, 442 Pa. 223, 275 A.2d 43 (1971), the court held that, because Commonwealth's one witness was in a mental institution, another witness said he would not testify, and argument by the prosecution that the law might change allowing the Commonwealth to use a confession previously held unconstitutional, these were not justification for nolle prosequi. In *Commonwealth v. DiPasquale*, 431 Pa. 536, 246 A.2d 430 (1968), this Court held that the inability of the Commonwealth to prove a prima facie case because its only witness would repudiate a prior statement and plead the Fifth Amendment, was not sufficient reason for granting a nolle prosequi.

There was no justification for the nolle prosequi, no imperious necessity for the nolle prosequi, no valid reason whatsoever for the nolle prosequi. We submit that here was a clear abuse of discretionary power and by this abuse, Reinhart's rights were totally denied him. Reinhart has been left in the unfortunate position of being at the mercy of Bowers and the Commonwealth's prosecutor. There is no statute of limitations on a murder charge. On the basis of unsupported statements of intimidation and fear and on the basis of the "hope and prayer" that Bowers might sometime in the future change his mind, the lower Court allowed the nolle prosequi to be entered. The Commonwealth knew, or should have known about Bowers, and yet it based a serious charge of murder against Reinhart on that man's evidence. When Bowers was deprived of drugs, which occurred when he was sent to Graterford State Prison, his mind cleared and he pleaded the Fifth Amendment, not at Reinhart's trial, but in the Schneck trial. He never appeared in Reinhart's trial.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,
EMMANUEL H. DIMITRIOU,
Counsel for Petitioner

635 Walnut Street
Reading, Pennsylvania 19601
Telephone 1-(215)-376-7217

APPENDIX A—OPINIONS

COURT OF COMMON PLEAS OF SCHUYLKILL COUNTY—CRIMINAL

Nos. 405, 405A September Term, 1972

Commonwealth of Pennsylvania

vs.

Dale H. Reinhart

Richard B. Russell, Esq., District Attorney, for the Commonwealth.

W. D. Balitas, Esq., and Anthony J. Urban, Esq., for the Defendant.

OPINION OF THE COURT

Walesky, J.

The hearing judge was served with notice of appeal in the above captioned matter on February 5, 1973.

In compliance with Pennsylvania Supreme Court Rule 63, we herewith file for record purposes the reason for the ruling which was made part of the record on January 9, 1973 wherein we sustained the Commonwealth's motion for nolle pros.

The case was attached for trial on January 5, 1973. Jury selection commenced the same day. Three jurors were selected to sit on the panel. They were not sworn.

The Commonwealth motioned for a continuance to an indeterminate date. This motion was disallowed. The Commonwealth followed with a motion for nolle pros.

Pa. R. Crim. P. 1110 provides as follows:

"(a) After all jurors have been selected, the jury, including any alternates, shall be sworn as a body to hear the cause."

Pa. R. Crim. P. 314 sets out:

"(a) Upon application of the attorney for the Commonwealth, the court may, in open court, order a nolle prosequi notwithstanding the objection of any person."

The three members of the jury panel selected were not sworn and did not constitute a duly selected trial jury. We concluded, therefore, that the motion for a nolle pros. (Pa. R. Crim. P. 314, supra) made in open court, was proper and within the scope of said rule.

The granting of a nolle pros. is within the discretion of the court. See Comm. vs. DiPasquale, 431 Pa. 536, 246 A.2d 430 (1968).

We accordingly granted the motion for nolle pros.

Dated this 15th day of March, 1973.

By the Court,
Walesky,
J.

IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

No. 236 January Term, 1973

Commonwealth of Pennsylvania

v.

Dale H. Reinhart

Appellant

Appeal from the Order of the Court of Common Pleas of Schuylkill County, Criminal Division, at Nos. 405 and 405A September Term, 1972.

OPINION OF THE COURT

Roberts, J., filed March 18, 1976:

In this appeal,[1] we are presented with three issues arising from the grant of a nolle prosequi: (1) is Pa. R. Crim. P. 314 (a),[2] which provides that a trial court may, upon request of the Commonwealth, grant a nolle prosequi

[1] We hear this case under authority of the Appellate Court Jurisdiction Act of 1970, Act of July 31, 1970, P.L. 673, art. II, §205, 17 P.S. §211.205 (Supp. 1975); id., art. V, §503(a), 17 P.S. §211.205(a). See Commonwealth v. Leaming, 442 Pa. 223, 225-26, 275 A.2d 43, 44 (1971):

> "We must address ourselves initially to the question of the appealability of the order granting the nolle prosequi. The Commonwealth asserts that the order is interlocutory, noting that appellant could raise his speedy trial claim if and when the Commonwealth petitions the trial court to remove the nolle prosequi and that the necessity for our review of the speedy trial issue would disappear altogether if appellant were to win an acquittal on retrial.
>
> "To the extent that the constitutional guarantee of speedy trial reflects a desire to minimize the degree to which pretrial delay hampers an accused's ability to defend himself, appellant would indeed have an adequate opportunity to secure relief by appealing any subsequent conviction on the ground of prejudicial delay. However, the speedy trial guarantee is also much concerned with limiting the period of 'anxiety and concern accompanying public accusation.' United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 776 . . . (1966), and, in this regard, quashing the instant appeal makes little sense. The logic of the Commonwealth's position allows for the possibility that appellant will be forced to live under the shadow of a pending indictment for years, and appellate review after trial at the expiration of such a potentially long period can provide no effective remedy for the intervening anxiety and concern. Accordingly, even if the nolle prosequi order be interlocutory, the particular nature of the speedy trial issue presents 'exceptional circumstances' dictating appealability."

Cf. Commonwealth v. Bunter, 445 Pa. 413, , 282 A.2d 705, 707 (1971) (motion to quash indictment appealable interlocutory order). But cf. Commonwealth v. Barber, Pa. , 337 A.2d 855 (1975) (motion to quash indictment not appealable order).

We note, with disapproval, that neither appellant nor the Commonwealth has provided the required jurisdictional statement in the briefs filed in this Court. See Pa. Sup. Ct. R. 47.

[2] Pa. R. Crim. P. 314(a):

> "(a) Upon application of the attorney for the Commonwealth, the court may, in open court, order a nolle prosequi notwithstanding the objection of any person."

"notwithstanding the objection of any person," valid under the Federal Constitution; (2) was appellant denied due process of law under the Federal Constitution by the trial court's grant of a nolle prosequi; and (3) was the trial court's grant of a nolle prosequi an abuse of discretion.

On February 1, 1972, after several hours of drinking with undercover agents of the Pennsylvania State Police, Joseph Francis Bowers confided that he and two other men had been involved in the burglary-murder of John L. Miller in June of 1969. A week later the agents again sought out Bowers, who once again admitted his participation in the crime. A criminal complaint was filed against Bowers on March 8, 1972, and he was indicted on July 13, 1972.

While in prison, Bowers gave police a formal statement implicating himself, one Kemmerling, one Schneck and appellant in Miller's murder. Criminal complaints against the three were filed on June 27, 1972, and they were indicted October 4, 1972.

Counsel was appointed to defend appellant in July 1972. This counsel, however, withdrew from the case on October 2, 1972, two days before appellant was indicted, and was replaced by the public defender. The case was called for trial on November 15, 1972, at which time the defender, over appellant's objection in open court, moved for a continuance because he was not ready to go to trial. The continuance was granted, with trial scheduled for January 1973.

Schneck's case proceeded more quickly than did appellant's. A jury was sworn in Schneck's case on January 8, 1973. Bowers, the only witness able to link both

Schneck and appellant to the crimes charged was called but refused to testify, asserting his right to remain silent. The Commonwealth, caught by surprise, was unable to prove its case and was unable to obtain either a continuance or a nolle prosequi. Schneck was acquitted.

At this time a jury was being selected to hear appellant's case but had not yet been sworn. When Bowers refused to testify in Schneck's trial on January 8th, the Commonwealth asked for and was granted a short continuance in appellant's trial to determine whether Bowers would again refuse to testify if called as a witness in appellant's case. During the continuance Bowers, his attorney and attorneys for the Commonwealth conferred. Bowers indicated that he would refuse to testify in appellant's trial.

When appellant's trial resumed the following day, January 9th, the Commonwealth requested a continuance, alleging that it could not, without Bowers' testimony, prove a prima facie case. This motion was denied. The Commonwealth then requested a nolle prosequi. After hearing argument from both appellant and the Commonwealth, the nolle prosequi was granted. In its written opinion, the trial court, relying on Pa. R. Crim. P. 314(a) and Commonwealth v. DiPasquale, 431 Pa. 536, 246 A.2d 430 (1968), stated that the grant of the nolle prosequi was a proper exercise of the trial court's discretion. Appellant appeals from the order granting the nolle prosequi.

Appellant challenges the constitutionality of Pa. R. Crim. P. 314(a). His attack seems to focus on the "notwithstanding the objection of any person" portion of the rule. After quoting Rule 314(a), appellant states:

> "By its' [sic] language, the rule closes the door on all defendants and gives to the attorney for the Commonwealth the exclusive and sole right to prosecute or not to prosecute. Defendant's rights are completely ignored. There are no provisions for any processes on a defendant's behalf. Clearly a denial of due process."[3]

In this case, however, the record shows that appellant was permitted to present objections to the trial court before the nolle prosequi was granted. It is clear, therefore, that the trial court did not interpret the "notwithstanding the objection of any person" language to bar such argument. Nor does appellant allege that the trial court ignored his arguments, thus making the opportunity to present them meaningless. The record shows that the trial court indicated it would consider the merits of appellant's argument and there is no basis for this Court to conclude that it did otherwise.

The trial court's action in this case was perfectly consistent with the rule. The challenged language merely means that a criminal defendant does not have an absolute right to be tried on demand. A motion for a nolle prosequi is treated like any other motion: one side presents the motion to the court; both sides argue the merits of the requested motion; the court considers the merits of their arguments; and the trial court issues a ruling. The rule in no way bars the presentation of objections by the defendant nor does it direct the trial court to ignore those objections. It merely states that the defendant's objection is not dispositive of the issue.

---

[3] Brief for Appellant at 7.

We now turn to appellant's claim that the grant of a nolle prosequi, apart from the validity of the rule, denied him due process of law.[4] Appellant relies primarily on Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988 (1967), which held that the sixth amendment guarantee of a speedy trial is applicable to the states through the fourteenth amendment.

A speedy trial claim is analyzed in two steps: (1) is the delay itself sufficiently long to trigger the "necessity for inquiry into other factors that go into the balance,"[5] and (2) a balancing of the length of delay, reason for delay, defendant's assertion of the right and prejudice to the defendant.[6]

Appellant was indicted October 4, 1972, and the trial was scheduled to begin November 13, 1972. When appellant's case was called on November 15, 1972, appellant's counsel, the public defender, requested and was granted, over appellant's objection, a continuance until the January court term. The case was called for trial on January 5, 1973, and the nolle prosequi was granted January 8, 1973.

The issue we must decide is whether the grant of a nolle prosequi on January 8 denied appellant due process of law by denying him his right to a speedy trial. We must

---

[4] Appellant asserts no claim under either Pa. Const., art I, §9, or under Pa. R. Crim. P. 1100. We, therefore, do not address these issues.

[5] Barker v. Wingo, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192 (1972).

[6] Id. at 530-33, 92 S.Ct. at 2192-93.

consider this issue in light of the facts and circumstances extant on January 8th.[7]

The total delay from indictment to nolle prosequi was 93 days.[8] We do not believe that a 93 day delay[9] is sufficient to trigger the full speedy trial inquiry when the

[7] A decision which reflected facts and events after January 8, 1973, would require us either to speculate what occurred after that date or to take evidence ourselves. Neither is an appropriate activity for an appellate court.

If the situation has changed between January 8, 1973, and the present, appellant is free under Pa. R. Crim. P. 304 to make a pretrial application to quash the indictment or for other relief. This factor distinguishes this case from Klopfer in which there was no way by which Klopfer could have the outstanding charges either tried or dismissed.

[8] Appellant, in his brief with this Court, details the lapse of time between the Commonwealth's knowledge of his alleged participation in Miller's murder and his indictment. We do not consider this time in determining whether the delay was sufficient to trigger the full Barker analysis because the speedy trial protection afforded by the Federal Constitution applies only to delay between indictment and trial.

> "The Supreme Court recently held that the constitutional right to a speedy trial, guaranteed by the Sixth Amendment and held applicable to the states by the Fourteenth Amendment . . . only protects defendants from prosecutorial delay between indictment and trial. United States v. Marion, 404 U.S. 307, 92 S.Ct. 455 . . . (1972). The Court's decision in Marion rested in large part on the presence of statutes of limitations designed to protect defendants against pre-indictment delay . . . ."

Commonwealth v. Cardonick, 448 Pa. 322, 333, 292 A.2d 402, 408 (1972).

[9] For purposes of determining whether the full Barker analysis should be applied we take the total delay between indictment and the grant of the nolle prosequi. This initial determination looks only to the amount of delay. If the delay is sufficient to trigger the full analysis, we may then look to the causes of the delay to determine whether appellant's speedy trial rights have been infringed. Cf. Pa. R. Crim. P. 1100(d); Townsend v. Superior Court, Ca. , Cal. Rptr. , P.2d (1975) [18 Crim. L. Rptr. 2368 (Cal. Sup. Ct. December 24, 1975)].

charge involved is a major felony.[10] We therefore hold that the grant of a nolle prosequi on January 8, 1973, did not deny appellant his right to a speedy trial because the delay involved was not sufficiently long to be presumptively prejudicial.

Finally, appellant argues that the trial court abused its discretion by granting the nolle prosequi. Appellant relies on the Commonwealth's readiness to go to trial on November 15, 1972, when the public defender requested a continuance, and its reaffirmance of that readiness on January 5, 1973, when the case was called. Appellant concludes that the trial court abused its discretion by believing the Commonwealth's statement, on January 8, 1973, that it could not prove a prima facie case and by granting a nolle prosequi on that basis. We disagree.

A trial court's grant of a nolle prosequi will not be overturned on appeal unless it appears to be an abuse of discretion.[11] Pennsylvania law indicates that there are two

[10] See Barker v. Wingo, 407 U.S. 514, 531, 92 S.Ct. 2182, 2192 (1972).

[11] Commonwealth v. DiPasquale, 431 Pa. 536, 541, 275 A.2d 431, 432 (1971):

> "The grant or refusal of a petition for a nolle pros and for a continuance lies within the sound discretion of the lower court, and its action will not be reversed in the absence of an abuse of discretion."

factors to be considered when a request for a nolle prosequi is made: (1) is the reason given by the Commonwealth for requesting the nolle prosequi valid and reasonable,[12] and (2) does the defendant, at the time the nolle prosequi is requested, have a valid speedy trial claim?[13]

We have already determined that appellant did not have a speedy trial claim on January 8. Therefore, if the Commonwealth had a valid reason for requesting the nolle prosequi, the trial court's action will be upheld.

The Commonwealth was clearly surprised by Bowers' refusal to testify; otherwise they would never have risked empaneling a jury in the Schneck case. Because it was surprised by the sudden unavailability of Bowers' testimony, the earlier representations of preparedness cannot be regarded as deliberate, or even negligent attempts to deceive either appellant or the court or to subject appellant to unnecessary delay or other burden.

Although the refusal of a witness to testify is not completely analogous to the unavailability of a witness, it is nonetheless a valid basis for some trial delay. As the United States Supreme Court stated in Barker v. Wingo, 407 U.S. 514, 534, 92 S.Ct. 2182, 2194 (1972):

---

[12] See Commonwealth v. Leaming, 442 Pa. 223, 275 A.2d 43 (1971). In Leaming we vacated the nolle prosequi because we found its grant to be an abuse of discretion. We remanded the case for a "prompt trial or, failing that, for final dismissal of the charges." Appellant here is not entitled to the Leaming relief because the record presents substantially different facts justifying the grant of the nolle prosequi.

[13] See, e.g., Commonwealth v. DiPasquale, 431 Pa. 536, 246 A.2d 430 (1968).

> "[S]ome delay would have been permissible under ordinary circumstances, so that Manning could be utilized as a witness in Barker's trial . . . ."

Manning, of course, was the Bowers of Barker's case: a co-defendant who refused to testify because to do so would implicate himself. The delay the Court was approving was the time ordinarily necessary to try and convict the reluctant witness, thus invalidating his claim of privilege.

Because appellant did not have a valid speedy trial claim when the nolle prosequi was granted and because the Commonwealth had a proper reason for requesting it, the grant of a nolle prosequi in appellant's case was proper.

Order affirmed.

Mr. Justice Manderino joins in this opinion and files a concurring opinion. Mr. Justice Eagen and Mr. Justice Pomeroy concur in the result. Mr. Justice Nix filed a dissenting opinion.

[Caption Omitted.]

CONCURRING OPINION

Justice Manderino, Filed: March 18, 1976:

I join in the opinion of Mr. Justice Roberts which properly does not address itself to whether the prosecution may at any future date prosecute the appellant. That is an issue which need not be considered in this appeal.

[Caption Omitted.]

DISSENTING OPINION

Nix, J., Filed: March 18, 1976:

In my judgment, the majority has failed to perceive the full thrust of appellant's due process claim. I believe appellant's position to be meritorious and therefore dissent.

The members of the majority focused upon the question of a speedy trial and concluded that the rights of the accused in that regard were adequately protected. While I do not find that result troublesome, I am concerned that no attention was given to the question of an accused's right to insist upon trial before his peers for the purpose of seeking public vindication once he has been formally charged with crime.

The protection of due process is not limited to possible threats against one's penal interest. The reputation of an individual is as precious as any interest and is oftimes gained only after years of industry and restraint.[1] Where a system permits that reputation to be sullied and

[1] "The purest treasure mortal times afford
Is spotless reputation." Shakespeare, King Richard II, Act I, Sc. 1.

"He whose honour depends on the opinion of the mob must day by day strive with the greatest anxiety, act and scheme in order to retain his reputation. For the mob is varied and inconstant, and therefore if a reputation is not carefully preserved it dies quickly." Spinoza, Ethics, Prop. LVIII, Note

stained through the government's virtually unfettered right to initiate prosecution, that system must also provide the person charged with an adequate opportunity for exoneration where the charges proved to be unwarranted or incapable of substantiation.[2]

To allow the imposition of a nolle pros, over the objection of the accused, forecloses the right to effectively demonstrate the fallaciousness of the imputation occasioned by the institution of the original prosecution. Even where the possibility of further prosecution is foreclosed, the accused is not relieved of the stigma caused by the arrest and indictment. Where the action is terminated by a nolle pros, it is the decision of the prosecutor and not necessarily the innocence of the person that brings about the result. Where one has a trial before his peers, he is afforded the opportunity to affirmatively demonstrate his innocence.

I am fully cognizant of the presumption of innocence. However, realistically we all must concede that this presumption alone is incapable of fully removing the stain. Due process must also provide a reciprocal right to the person charged to compel the Commonwealth to expose to public scrutiny the basis upon which the charges were brought, and also supply a forum in which testimony may be offered to refute the accusations and eradicate the suggestion of impropriety. The presumption of innocence requires the Commonwealth to prove guilt but it should not be construed as a basis for denying the defendant the right to affirmatively establish his innocence.

[2] Nor can it be argued that an adequate redress is provided by tort liability. In many instances one may be mistakenly charged with crime and yet not have available to him civil redress.

APPENDIX B—ORDER

COURT OF COMMON PLEAS—CRIMINAL—FOR THE COUNTY OF SCHUYLKILL

Nos. 405, 405A September Term, 1972

Commonwealth of Pennsylvania

vs.

Dale H. Reinhart

ORDER OF COURT

AND NOW, this 9th day of January, 1973, Motion by Attorney Bavolack for continuance, disallowed by the Court. Motion by Attorney Bavolack to Nol Pros, allowed by the Court.

By the Court,
Walesky,
J.

Supreme Court, U. S.
FILED
SEP 16 1976
MICHAEL RODAK, JR., CLE

In The

Supreme Court of the United States

Term, 1976
No. 225

DALE H. REINHART,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA
Respondent

RESPONDENT'S OPPOSITION BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

RICHARD B. RUSSELL,
District Attorney of
Schuylkill County, Pennsylvania.

ADAM BAVOLACK,
Assistant District Attorney,
Attorneys for Respondent.

Court House,
Pottsville, Pennsylvania 17901
Telephone (717) 622-6833

SEIDERS - PRINTING - POTTSVILLE

INDEX

	Page
QUESTIONS INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT	5
CONCLUSION	11

TABLE OF CASES

	Page
Barker v. Wingo, 407 U. S. 514, 534, 92 S. Ct. 2182, 2194, 33 L. Ed. 2d 101 (1972)	9
Commonwealth v. DiPasquale, 431 Pa. 536, 246 A2d 430 (1968)	8
Commonwealth v. Gant, 213 Pa. Super. 427, 249 A2d 845 (1968)	10
Commonwealth v. Leaming, 442 Pa. 223, 275 A2d 43 (1971)	10
Commonwealth v. Reinhart, Pa. 353 A2d 848, March 18, 1976	4, 7
Commonwealth v. Smith, 232 Pa. Super. 546, 334 A2d 741 (1975)	10
Dawnum v. U. S., 372 U. S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 (1963)	10
Klopfer v. North Carolina, 286 U. S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967)	7

QUESTIONS INVOLVED

Commonwealth's questions 1, 2, and 3 are adopted as logically set out in the opinion of the Pennsylvania Supreme Court which covers all relevant issues in the instant case. (p. 16, Pet. Brief)

1. Is Pennsylvania rule of criminal procedure 314(a) which provides that a trial court may, upon request of the Commonwealth, grant a nolle prosequi "not withstanding the objection of any person", valid under the Federal Constitution?

2. Was petitioner denied due process of law under the Federal Constitution and the Constitution of Pennsylvania Article I, Section 9 by the trial courts grant of a nolle prosequi?

3. Was the trial court's grant of a nolle prosequi an abuse of discretion?

4. Is the doctrine of imperious necessity applicable?

STATEMENT OF THE CASE

This case arose as the result of a motion and grant of a nolle prosequi by the trial court. The Pennsylvania Supreme Court affirmed the order of the trial court, and the case is before your Honors on petition for a Writ of Certiorari to that court.

The petitioner was one of four persons charged with the murder of John Lamont Miller on June 3, 1969, in his home in Schuylkill County during the commission of a burglary. The police had no clue until more than two and one-half years later.

During early February of 1972, after several hours of drinking with undercover agents of the Pennsylvania State Police, Joseph Francis Bowers confided that he and three other men had been involved in the burglary-murder of Miller on June 3, 1969. As the result of this and subsequent statements by Bowers, a complaint was filed against Bowers on March 8, 1972, and he was indicted on July 13, 1972.

Further statements by Bowers to the police implicated the petitioner, and one Kemmerling, and one Schneck in the murder. Criminal complaints against the latter three were filed on June 27, 1972, and they were indicted on October 4, 1972. On October 2, 1972, two days before petitioner was indicted, his then counsel withdrew and the public defender was appointed. The case was called to trial November 15, 1972, and a continuance was granted at the request of petitioner's counsel because he was not ready to go to

trial. Nine pre-trial motions were filed by the petitioner during the months of November and December, commencing November 6, 1972, the last of which was disposed of by the trial court on January 2, 1973.

Schneck's case proceeded more quickly than did petitioner's. A jury was sworn in Schneck's case on January 8, 1973. Bowers, the only witness able to link both Schneck and petitioner to the crimes charged was called but refused to testify, asserting his right to remain silent. The Commonwealth, caught by surprise, was unable to prove its case against Schneck and was unable to obtain either a continuance or a nolle prosequi. Schneck was acquitted.

On January 8, 1973, petitioner's case was attached for trial, and the process of selection of a jury began. After the selection of three jurors, who were not sworn, the case was adjourned until the morning of January 9, when the Commonwealth asked for and was granted a short continuance to determine whether Bowers, a vital witness who refused to testify the preceding day in Schneck's case would again refuse to testify if called as a witness in petitioner's case. During the recess, Bowers reiterated that he would refuse to testify in petitioner's trial. For this reason, a continuance was requested by the Commonwealth and refused by the trial court. The Commonwealth then motioned for a nolle prosequi, and after hearing argument by the Commonwealth and petitioner in the forenoon, the trial court after consideration granted the nolle prosequi that afternoon [illegible]it: January 9, 1973. Upon appeal of the

petitioner to the Pennsylvania Supreme Court, the Order of the Trial Court granting nolle prosequi was affirmed. *Commonwealth v. Reinhart,* Pa. 353 A 2d 848, March 18, 1976.

It is from this ruling that the petitioner requests the present writ.

ARGUMENT
Reasons Why Writ Should Be Denied

1. Is Pennsylvania rule of criminal procedure 314(a), which provides that a trial court may upon request of the Commonwealth, grant a nolle prosequi "not withstanding the objection of any person", valid under the Federal Constitution?

The petitioner challenges the Constitutionality of 314(a). (p. 4, Pet. Brief) The Pennsylvania Supreme Court noted that the petitioner was permitted to present objections to the trial court and that the trial court indicated it considered the merits of the petitioner's argument. The Court further said (p. 20, Pet. Brief):

> "The Rule in no way bans the presentation of objections by the defendant nor does it direct the trial court to ignore those objections. It merely states that the defendant's objection is not dispositive of the issue."

Therefore, no Constitutional rights of the defendant are violated by the above Rule.

2. Was petitioner denied due process of law under the Federal Constitution and the Constitution of Pennsylvania article I, Section 9 by the trial court's grant of a nolle prosequi?

For the sake of clarity, the following chronology of the record of the lower court is presented for consideration indicating the time element complained of:

January 3, 1969 — Date of alleged crime.

July 27, 1972 — Complaint filed.

October 4, 1972 — Grand Jury indictment approved.

October 10, 1972 — Arraignment.

November 6, 1972 — First of nine pre-trial applications filed.

November 15, 1972 — Case called for trial and continuance granted to petitioner.

January 2, 1973 — Last pre-trial application disposed of by trial court.

January 8, 1973 — Schneck jury selected, sworn and trial commenced.

January 8, 1973 — Petitioner's trial called; three jurors selected but not sworn.

January 9, 1973 — Motion for continuance by Commonwealth refused. Motion for Nolle Prosequi granted. Defendant released from custody.

The petitioner contends he was deprived of due process of law under the Federal Constitution and Pennsylvania Constitution. The Pennsylvania Constitution as to right of a speedy trial is fundamentally similar to the Federal Constitution.

A speedy trial claim is analyzed in two steps: (1) is the delay sufficiently long to trigger the necessity for an inquiry in the other factors that

go into the balance, and (2) a balancing of the length of delay, reason for delay, accused's assertion of the right, and prejudice to the accused. (p. 21, Pet. Brief)

The chronology above indicates a delay of 93 days from indictment and that the delay in part was due to petitioner's pre-trial motions.

In support of his petition, the petitioner relies mainly on *Klopfer v. North Carolina,* 386 U. S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967), a civil rights case where defendant participated in a restaurant demonstration. That case is distinguished in many ways from the instant case. (1) A trial had been held in which the jury disagreed and a mistrial was declared. (2) Thereafter, nothing was done by the Commonwealth for 18 months. (3) A nolle prosequi was granted without offering any justification or reason for the delay. (4) The case was remanded for trial. (5) The defendant was unable under North Carolina law to either have the case tried or dismissed.

Pennsylvania Rules of Criminal Procedure 304, adopted June 30, 1965, provides for a pre-trial right of defendant for application to quash. (See N. 7, p. 22, Pet. Brief)

The instant case involves a major felony. (1) This was not a re-trial. (2) Only 93 days expired from the date of the indictment to the grant of the nolle prosequi. (3) The Commonwealth offered a valid reason for the delay. *Commonwealth v. Reinhart,* (p. 25, Pet. Brief) (353 A 2d 848, March 18, 1976)

The total delay, including the time lost due to the petitioner's request for a continuance from the date of approval of the indictment to January 9, 1973 is 93 days.

The Pennsylvania Supreme Court said in the instant case:

> "The total delay from indictment to nolle prosequi was 93 days. We do not believe that a 93 day delay is sufficient to trigger the full speedy trial inquiry when the charge involved is a major felony. We therefore hold that the grant of a nolle prosequi on January 8, 1973, did not deny appellant his right to a speedy trial because the delay involved was not sufficiently long to be presumptively prejudicial." (p. 22-23, Pet. Brief)

3. Was the trial court's grant of a nolle prosequi an abuse of discretion?

The Commonwealth contends the trial court did not abuse its discretion in granting the nolle prosequi. The Commonwealth in requesting the nolle prosequi asserted that without Bowers' testimony, it could not prove a prima facia case. (Trial transcript p. 18) The trial court after refusing a continuance granted a nolle prosequi. Both the Commonwealth and the defendant were heard by the trial court. The trial court in its written opinion relying on Pennsylvania Rule of Criminal Procedure 314(a) and *Commonwealth v. DiPasquale,* 431 Pa. 536, 246 A2d 430 (1968) stated that the grant of the nolle prosequi was a proper exercise

of its discretion. (p. 15, Pet. Brief) The Court in *DiPasquale* said (p. 432):

> "The grant or refusal of a petition for Nolle Prosequi and continuance lies within the sound discretion of the lower court, and its action will not be reversed in the absence of an abuse of discretion."

In the instant case, the Pennsylvania Supreme Court said:

> "A trial court's grant of a nolle prosequi will not be overturned on appeal unless it appears to be an abuse of discretion. Pennsylvania law indicates that there are two factors to be considered when a request for a nolle prosequi is made: (1) is the reason given by the Commonwealth for requesting the nolle prosequi valid and reasonable, and (2) does the defendant, at the time the nolle prosequi is requested, have a valid speedy trial claim? We have already determined that an appellant did not have a speedy trial claim on January 8." (p. 23-24 Pet. Brief)

Applying the standards of *Barker v. Wingo,* 407 U. S. 514, 534, 92 S. Ct. 2182, 2194 (p. 24-25, Pet. Brief), the court concluded that the instant case was parallel to the *Barker* case, and that some delay was permissable under ordinary circumstances. The Commonwealth did have a valid reason, and the action of the lower court was affirmed.

The case of *Commonwealth v. Gant,* 213 Pa. Super. 427, 249 A2d 845 (1968), cited by petitioner is inapposite. There, (1) a new trial was awarded; (2) 8 months had passed, and (3) no justification was offered for the delay.

Commonwealth v. Leaming, 442 Pa. 223, 275 A2d 43, (1971), cited by petitioner is also distinguished. (1) A new trial was granted, (2) There was no retrial for more than 2 years, and (3) The chief witness was hopelessly insane and there was no likelihood of a trial in the forseeable future. The Court held this to be an abuse of discretion. This opinion was written by Justice Roberts, who wrote the opinion in the instant case.

In both these Pennsylvania cases, the appellate court remanded the cases for trial, as the U. S. Supreme Court did in *Klopfer.*

4. Is the doctrine of imperious necessity applicable?

The double jeopardy clause under the Fifth Amendment is not in issue, therefore, the question of the exercise of the discretion of the court on the basis of "imperious necessity" has no application to any issue in this case. Consequently, *Dawnum v. United States,* 372 U. S. 734, 10 L. Ed. 2d 100, 83 S. Ct. 1033 (1963) is not controlling. Only three jurors were selected but not sworn. Double jeopardy does not attach until the jury has been impanelled and sworn. *Commonwealth v. Smith,* 232 Pa. Super. 546, 334 A2d 741 (1975)

The initial delay was triggered by the refusal of Bowers to testify on January 9, 1973. Bowers was tried and convicted; his motion for a new

trial was refused and he is ordered to appear for sentence on September 13, 1976. In the meantime Schneck, who was freed, has now agreed to testify against the defendant. A motion to vacate the nolle prosequi as to petitioner was granted by the trial court. Now, it is interesting to note the defendant has appealed this order vacating the nolle prosequi to the appellate courts of Pennsylvania. Consequently, his request for this Writ of Certiorari is illogical and inappropriate under the record as it stands.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

RICHARD B. RUSSELL,
District Attorney.

ADAM BAVOLACK,
Assistant District Attorney,
Attorneys for Respondent.

Court House
Pottsville, Pennsylvania 17901